1886

JAGADAMBA CHAODHRANI v. DAKHINA MOHUN ROY CHAODHRI.

death. . . . On the above view of the document the words of the Statute would seem scarcely applicable to it." And then follows the passage above quoted. It is clear, therefore, that in that case the plaintiff was not embarrassed by the widow's adoption of the defendant. He could recover the estate of Doorga Pershad without in any way disturbing the adoption. And to apply the remarks there made, in somewhat general terms, to a case in which the heir cannot possibly get at the ancestor's property without disturbance of a title and of possession founded on adoption to that ancestor, is to put upon them a meaning they were never intended to bear.

The result is that for the foregoing reasons their Lordships agree with the opinion expressed by the Subordinate Judge on this point. They think that the High Court should have dismissed with costs the appeal from that Judge's decree, and they will now humbly advise Her Majesty to make a decree to that effect.

The respondents, who are in the interest of the original plaintiffs, must pay the costs of these appeals.

Appeals allowed with costs.

Solicitors for the appellants: Messrs. *Barrow & Rogers.*

Solicitors for the respondents: Messrs. *Watkins & Lattey.*

C. B.

CIVIL REFERENCE.

Before Mr. Justice Miller and Mr. Justice Grant.

1886. *July* 16.

OO NOUNG AND ANOTHER (PLAINTIFFS) *v.* MOUNG HTOON OO AND OTHERS (DEFENDANTS).*

Equitable Mortgage—Deposit of title deeds—Contract of Mortgage—Letter stating terms of Equitable Mortgage, Effect of—Equitable Mortgagee, his proper remedy.

A and *B* executed a joint and several promissory note in favour of the plaintiff. On the same day *A* deposited with the plaintiff the title deeds of his property as collateral security, and received conjointly with *B* a part of the consideration money for the promissory note. Shortly afterwards *A*

* Civil Reference No. 8 of 1886, made by C. E. Fox, Esq., Officiating Additional Recorder of Rangoon, dated the 11th of May 1886.

1886

Oo Noung v. Moung Htoon Oo.

addressed a letter to the plaintiff to this effect: "As collateral security for the due payment of Rs. 2,000 secured by a promissory note of even date * * I herewith hand you the title deeds of my property * * money borrowed and received in pledge of house," and obtained the balance.

In a suit on the basis of the documents for foreclosure, or for sale of the property, or in the alternative for a conveyance of the legal estate:

Held, that the letter itself was not a contract of mortgage, and was without registration admissible in evidence of the equitable mortgage which had been completed upon deposit of title deeds.

Held, also, that the fact of the letter would not prevent the plaintiff from giving any other evidence in proof of his claim. *Kedar Nath Dutt* v. *Sham Lall Khettry* (1) followed.

Held, further, that the plaintiff was not entitled upon the transaction to a conveyance of the legal estate, his proper remedy being by sale of the mortgaged property.

REFERENCE under s. 54 of the Burma Court's Act, 1875.

This was a mortgage suit. On the 9th September 1884 Moung Htoon Oo and another executed a joint and several promissory note in favour of Oo Noung and Mah Bwin, the plaintiffs, for the sum of Rs. 2,000. On the same day Moung Htoon Oo deposited with Oo Noung the title deeds of a piece of land in Rangoon known as 5th class, Lot No. 134, Block Y1, and shortly afterwards wrote the following letter to the plaintiffs:—

"As collateral security for the due payment of Rs. 2,000 and interest, secured by a promissory note of even date, executed by me in your favour, I herewith hand you the title deeds of my property in Lammadaw quarter, built on 5th class, Lot No. 134, in Block Y1, with all the buildings thereon, which you are authorized to hold against all persons until the said sum of Rs. 2,000 and interest are fully paid and satisfied."

At the foot of the above there was this note: "Money borrowed or received on the 5th decreased moon of the month of Tawthalin 1246 in pledge of house situated in Lammadaw quarter, rupees two thousand, and the title deeds of the house are deposited with Oo Noung and Mah Bwin." Then there was the signature of Moung Htoon Oo. The letter was an unregistered document. The consideration money, Rs. 2,000, was paid in two instalments. The sum of Rs. 1,000 was paid to Moung Htoon Oo and his co-executant of the promissory note immediately on the deposit of the title deeds,

(1) 11 B. L. R., 405.

1886

OO NOUNG v. MOUNG HTOON OO.

and about two hours afterwards, the balance, Rs. 1,000, was paid to Moung Htoon Oo upon his having signed the above letter.

Oo Noung and Mah Bwin brought a suit in the Court of the Recorder of Rangoon for foreclosure or for sale of the property, or in the alternative for a conveyance of the legal estate covered by the title deeds.

For the defence it was contended that the plaintiffs acquired no rights in the property in consequence of the letter of deposit not having been registered, and that by reason of s. 91 of the Evidence Act no other evidence but the letter could be given to prove the equitable mortgage. The following cases were relied upon:—*Dwarka Nath Mitter* v. *Sarat Kumari Dasi* (1); *Valaji Isaji* v. *Thomas* (2); *Ganpat Pandurang* v. *Adarji Dada Bhai* (3); *The Bengal Banking Corporation* v. *Mackertich* (4); *Ex parte Leathes* (5); *Ex parte Heathcoate* (6); *Daw* v. *Terrell* (7); *In re Wight's Mortgage Trust* (8); *Credland* v. *Potter* (9); *Copland* v. *Davies* (10); *The Agra Bank* v. *Barry* (11).

On the other hand, it was urged on behalf of the plaintiffs (*a*), that the letter did not require registration; (*b*), that even if it did other evidence than the letter could be given to prove the mortgage; and (*c*), that in any case it was admissible in evidence for the purpose of substantiating their claim to a conveyance of the legal estate:—*Kedar Nath Dutt* v. *Sham Lall Khettry* (12); *Burjorji Cursetji Panthaki* v. *Muncherji Kuverji* (13); *The Bengal Banking Corporation* v. *Mackertich* (4). The Additional Recorder who tried the case was of opinion (*a*) that on the authority of *Kedar Nath Dutt* v. *Sham Lal Khettry* (12) the letter of deposit was admissible in evidence in proof of the equitable mortgage; (*b*), that upon the facts as found by him, the letter or memorandum of deposit was not admissible in evidence in proof of the right which the plaintiffs claimed to a conveyance of the

(1) 7 B. L. R., 55.
(2) I. L. R., 1 Bom., 190.
(3) I. L. R., 3 Bom., 312.
(4) I. L. R., 10 Calc., 315.
(5) 3 D. and C., 112.
(6) 2 M. D. and De Gex., 711.
(7) 33 Beav., 218.
(8) L. R., 16 Eq., 41.
(9) L. R., 10 Ch. App., 8.
(10) L. R., 5 H. L., 358.
(11) L. R., 7 H. L., 135.
(12) 11 B. L. R., 405
(13) I. L. R., 5 Bom., 143.

legal estate; and (*c*), that the letter or memorandum of deposit was "only a writing" which was evidence of the fact from which the contract was to be inferred, and that any other evidence might be given of the same fact.

But entertaining doubts on the points, the Additional Recorder referred the following questions to the High Court:—

(1) Whether the unregistered letter or memorandum of deposit is admissible in evidence in proof of the equitable mortgage claimed.

(2) In the event of the first question being answered in the negative, whether the letter of deposit is admissible in evidence in proof of the right which the plaintiffs claim to a conveyance of the legal estate.

(3) Whether, in consequence of the letter of deposit, the plaintiffs are precluded from giving any other evidence in proof of their claims mentioned in the second question.

Mr. *Sale* (instructed by Messrs. *Harris & Simmons*) for the plaintiffs.

No one appeared for the defendants.

The opinion of the High Court (MITTER and GRANT, JJ.) was as follows:—

We think that the present case is entirely governed by the judgment in *Kedar Nath Dutt* v. *Sham Lal Khettry* (1). As in that case, so in this, the question is, whether the memorandum or the letter of deposit referred to in the questions submitted to us was itself a contract of mortgage, or simply evidence of a fact from which the mortgage could be inferred. We think for the reasons given in *Kedar Nath Dutt's case* that the letter of deposit, as it is called in the questions submitted to us, was not a contract of mortgage between the parties. The equitable mortgage was effected by the deposit of the title deeds by the defendant No. 1 before the writing of that letter of deposit took place. In that letter it is simply recited that an equitable mortgage had been effected by the deposit of title deeds.

Not only is the present case supported by the judgment of the Appellate Court, in the case of *Kedar Nath Dutt*, but it may also be supported by the reasons given in the judgment of Mr.

(1) 11 B. L. R., 405.

1886

OO NOUNG v. MOUNG HTOON OO.

Justice Macpherson, who heard the case of *Kedar Nath Dutt* in the Original Court. There the transaction, according to the view taken by the Appellate Court, was not completed till the debtor in that case executed the note of hand, but in this case the execution of the note of hand preceded the deposit of the title deeds, and the letter of deposit was written about two hours after. That being so we think that in this case the transaction was completed before the letter of deposit was written. Upon both these grounds we agree with the learned Recorder in the answers to be given to the questions submitted to us. But with reference to the second question we desire to say that we by no means endorse his view that the plaintiffs would be entitled to a conveyance to them of the legal estate. This question has not been referred to us, but if it were, we should be inclined to hold that the proper remedy is by sale of the mortgaged property.

The record will be returned to the lower Court, and under s. 57 of Act XVII of 1875 the costs of this reference shall be considered as costs in the suit.

K. M. C.

APPELLATE CIVIL.

1886
July 26.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Ghose.

HIRA LAL CHATTERJI (PLAINTIFF) *v.* GOURMONI DEBI (DEFENDANT).*

Civil Procedure Code, 1882, *s.* 244—*Suit to recover purchase money on reversal of decree under which Sale in Execution took place—Separate suit—Party to proceedings in execution.*

G instituted a suit against *H*, *C* and *P*, which was dismissed with costs, but an appeal was preferred. Pending the appeal, however, *C* took out execution of the decree for costs, and brought to sale a house belonging to *G* of which *H* became the purchaser, paid the purchase money, and got possession. Subsequently the decision dismissing the suit was reversed on appeal, and the defendants in that suit were ordered to pay a certain sum to *G* with costs. *G* then applied for restitution of her house which had been sold under the decree reversed, and eventually obtained an unconditional order for possession, *H* being left to any remedy open to

* Appeal from Original Decree No. 530 of 1885, against the decree of Baboo Sharoda Prosad Chatterji, Rai Bahadur, Subordinate Judge of Hooghly, dated the 8th of September 1885.